In the High Court of Judicature at Madras

Dated:29.01.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.298 OF 1997

1. The District Collector
   South Arcot Vallalar District
   Cuddalore.

2. The Divisional Engineer
   Highways and Rural Works
   Beach Road, Cuddalore

3. The Assistant Divisional Engineer
   Highways and Rural Works
   Kurinjipadi ..Appellants/Respondents

vs

Thangaraj ..Respondent/Appellant

Second appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 29.4.1993 made in A.S.No.226 of 1993 on the file of Sub Court, Cuddalore confirming the Judgment and decree dated.9.12.1992 made in O.S.No.127 of 1993 on the file of Principal District Munsif's Court, Cuddalore.

For Appellants : Ms.R.Revathy,Govt.Advocate(CS)
For Respondent : Mr.R.Muralidharan

JUDGMENT

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This appeal has been preferred against the Judgment and decree in A.S.No.226 of 1993 on the file of the Court of Subordinate Judge, Cuddalore. The plaintiff who lost his case before the trial Court but succeeded in the first appellate Court is the respondent herein. The appeal has been preferred by the defendants 1 and 2 in O.S.No.127 of 1992 on the file of District Munsif's Court, Cuddalore.

2. The averments in the plaint relevant for the purpose of deciding this appeal are as follows:

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The suit is for declaration of title and for consequential mandatory injunction. The plaintiff is a Member of the Legislative Assembly in Kurinjipadi Constituency. He has constructed a Boarding and Lodging by name" Vallalar Boarding and Lodging" on the southern side of the Cuddalore-Virudhachalam road. The plaintiff has spent several lakhs to construct the said building. The said building is useful for the pilgrims who are visiting Cuddalore. From Cuddalore-Virudhachalam Road one can enter into the plaint schedule property through the land marked as "ABCD" in the plan. Apart from this, there is no other pathway is in existence to get access to the main road from the plaintiff's suit property. Due to political controversy, the third defendant is making an attempt to put up a fence in front of the plaintiff's lodge shown as "ABCD" and for the purpose, he has also dug several pits. Only to cause loss to the business of the plaintiff, the defendants are making such undue disadvantage to the plaintiff. In spite of the plaintiff's request, the third defendant is proceeding with his work. The plaintiff has also preferred a complaint to the Sub Inspector of Police, Cuddalore. The plaintiff has issued a notice under Section 80 CPC . Hence the suit.

3. The second defendant in his written statement which was adopted by the defendants 1 and 2 are as follows:

The suit is not maintainable. The suit property belongs to the Government. It is under the control of the defendants 1 and 2. The plaintiff is not in possession and enjoyment of the suit property. The plaintiff requested the defendants to cut and remove the trees from the suit property on 24.3.1990. The suit property situated near the plaintiff's lodge belongs to Highways. The plaintiff is making all sorts of attempts to trespass into the suit property. The defendants have not dug any pits so as to prevent the customers from going to the lodge of plaintiff is denied as false. Even the plaintiff has no right to make a claim over the suit property which belongs to the Government. On the Cuddalore-Virudhachalam Road, the defendants are maintaining a garden near the edge of the road from 1985 onwards. The total length of that garden is 125 meters with a width of 26.50 meters. For the past six years, Eucalyptus tree has been planted by the defendant in the suit property. Apart from this, some Tamarind tree, coconut tree and mango tree have also been planted and maintained by the defendants. There is a pathway with a width of 5 meters exclusively left for the public on the southern side of the suit property. There is also a panchayat road available on the western side of the garden with a width of seven meters. The said road is called as "ANS Colony" road. The plaintiff has constructed the "Vallalar Boarding and Lodging building on the south of the highways. ANS Colony road is situated on the west and south of the suit property. The request made by the plaintiff to cut and remove Eucalyptus tree has been turned down by the defendants. The above said garden is being maintained by the defendants by appointing NMR employees . Due to cyclonic wind,all the Eucalyptus trees fell down in November 1991. There are only two coconut trees, one mango tree and

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one woodapple tree are available now. The fence put up by the defendants are also no in existence now. The fence was put up only to prevent the theft of Eucalyptus trees. After leaving a pathway of five meters only, the fence was put up,some few years back, in order to protect the garden. Because of formation of fence, the right of the plaintiff is no way affected. The plan was also approved by the Vadalour Town Panchayat on 27.9.1991. At that time, there were trees and other trees were in existence. The plaintiff has failed to mention about this trees in his rough sketch. In the rough sketch, the plaintiff has shown a common pathway in front of his building. This itself will go to show the perverted attitude of the plaintiff. There is no proper notice under Section 80 CPC was given. The plaintiff has no cause of action. The plaintiff is not entitled to the relief asked for in the plaint. Hence the suit is liable to be dismissed

4. On the above pleadings, the trial Court had framed five issues for trial. On the side of the plaintiff, P.Ws 1 and 2 were examined and Exs A1 to A 14 were marked. On the side of the defendants, D.Ws 1 and 2 were examined and Ex B1 was marked. A Commissioner was appointed in this case. Ex C1 is the report of the Commissioner and Ex C2 is the plan.

5. After going through the oral and documentary evidence, the learned trial Judge has come to a conclusion that the plaintiff is not entitled to any relief, and consequently dismissed the suit with costs. Aggrieved by the Judgement of the learned trial Judge, the plaintiff has preferred A.S.No.226 of 1993 before the Sub Court, Cuddalore who has allowed the appeal but without costs thereby decreeing the suit as prayed for. Aggrieved by the findings of the first appellate Court, the defendants have preferred this second appeal.

6. The substantial question of law involved in this appeal is

> " 1. Whether the plaintiff/respondent will have the right of way to his Lodge across the Government land, when the lower appellate Court has given a finding that the appellant/Government has got right to have Garden?
> 2. Whether the plaintiff/respondent without pleading easement right, has the right of way over the Government's land?

7. The Points:

The plaint schedule property is the vacant space measuring 120 feet east west , 100 feet north south marked as "ABCD" as shown in the rough sketch. The relief asked for in the plaint is that for declaration to the effect that the plaintiff is having a right to have free access to his building "Vallalar Boarding and Lodging through the suit property marked by line "ABCD" and also for consequential injunction. The Commissioner was appointed to note down the physical features of the suit property. The suit property has been identified and marked in Ex C2 plan as "ABCD":. South of the above said "ABCD" lies Vallalar Boarding and Lodging building

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belongs to the plaintiff. According to the plaintiff, the only access to get ingress and egress to the Highways road on the north of his building is through the suit property and now the defendants are trying to put up a highway garden in the said property and also making arrangements to put up a fence around the suit property.

8. It is the case of the defendants that by the side of the suit property, there lies a lane called ANS Colony road on the west of the plaintiff's building. From the plan produced by the defendants and marked as Ex B1, it is seen that the proposed highway garden comes in front of the Vallalar Boarding and Lodging building. But the evidence of D.W.1, a Junior Engineer of Highways Department, would depose that highways have not trespassed into any property but the suit property belongs to the highways and that there is a road by name ANS Colony road is on the west of the plaintiff's building and that through that road, he can get access to the main highway road situated on the north of the said building. In the cross examination, he would admit that Ex A1 is a Town Panchayat plan and that he would admit that there is a space in between the Virudhachalam -Cuddalore main Road and the building of the plaintiff. The said space has been shown in Ex A1 as 5 feet frontage.

9. The learned Government Advocate appearing for the appellants would represent that the defendants are not going to put up any fence or garden in front of the plaintiff's building but they are constructing only bus stand and bye pass road. To show this, the learned counsel appearing for the respondent has filed some of the photographs taken recently for the suit property which shows that just in front of the plaintiff's building a bus stand and formation of a road are under way. Under such circumstances, there will not be any difficulty for the plaintiff to get access to the main road. Even though the defendants would contend that there is another road called ANS Colony road is available near the plaintiff's building, there is no other documents except Ex B1 plan, is produced to show the existence of the said ANS Colony road. The Commissioner has also not indicated the existence of any ANS Colony road on the west of the building belongs to the plaintiff in Ex C2 plan. D.W.1 has stated in the cross examination that he is not having any blue print in the village plan to show the existence of ANS Colony road. But he would say that ANS Colony is situated about one furlong away from the suit property and that the relevant records and plan relating to ANS Colony is only with the Town Panchayat. But the defendants have not taken any pain to send for those documents to show the existence of any road near the plaintiff's building. But any how, now, since the defendants are not putting up any fence in front of the plaintiff's building, the plaintiff is not entitled to neither declaration nor injunction as prayed for as rightly held by the trial Court.

10. The learned counsel appearing for the respondent relying on Bharathmatha Desiya Sangam Madhavaram by its Secretary M.Subramania Naicker and others-vs- Roja Sundaram and two others(99 L.W.833) and

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contended that the Municipality cannot put up any structures on the public pathway, which are not necessary for the maintenance or user of it as a pathway and that the installation of a statue or the putting up of other constructions cannot be said to be necessary for the maintenance or user of the road as a public highway and such acts would be unauthorised acts of Municipality. The learned counsel further contended that the access and right of way to owners of houses or premises abutting the road from all points on the boundary of their land-obstruction, removal of, by enforcing the right of the owners-permissibility-availability of alternative space not a ground for denying relief to plaintiff seeking his right of access.

11. Under such circumstances, I am of the view that even though the plaintiff is not entitled to any relief in the suit, some modifications is to be given in the order of the first appellate Judge. The learned first appellate Judge only under a presumption that if the fence is allowed to be erected in front of the plaintiff's property, then he may not have any access from his building to the road, has allowed the appeal which necessitated the defendants to prefer this appeal which in my considered view is to be allowed with modification. The points are answered accordingly.

12. In fine, the second appeal is allowed with the following modification in the decree and Judgment in A.S.No.226 of 1993 on the file of the Court of Subordinate Judge, Cuddalore. The learned counsel appearing for the respondent would represent at this juncture that the defendants/appellants may be directed not to put up any construction in the newly laid bye-pass road in front of "Vallalar Boarding and Lodging. It is also represented on behalf of the learned Government Advocate appearing for the appellants that the appellants/defendants are not going to put up any fence in front of the said lodge. Under such circumstances, it is made clear that the respondent is entitled to use the road and he should not be prevented by putting up any fence in front of the said lodge. The plaintiff shall not cause inconvenience to the public in using the newly laid road.

No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Subordinate Judge, Cuddalore (if Records any)

2. The Principal District Munsif, Cuddalore.

3. The Section Officer,
V.R.Section, High Court, Madras.104.

1 cc To Mr.R.Muralidharan, Advocate, SR.5189.

Second Appeal No.298 of 1997

MS(CO)
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